FILED
MAY 24 1985
ALEXANDER L. STEVAS,
CLERK

NO. 84-1677

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

GREEN BAY PACKAGING, INC.,
Petitioner,

v.

ADAMS EXTRACT COMPANY, et al.,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

STEPHEN D. SUSMAN*
TERRELL W. OXFORD
SUSMAN, GODFREY & MCGOWAN
2400 Allied Bank Plaza
Houston, Texas 77002
(713) 651-9366

JACK CORINBLIT*
MARC M. SELTZER
CORINBLIT, SHAPERO & SELTZER
A Partnership of Professional Corporations
3700 Wilshire Blvd., Suite 820
Los Angeles, California 90010
(213) 380-4200
Attorneys for Respondents Adams Extract Company, et al.

* Counsel of Record

Alpha Law Brief Co., Inc.—5606 Parkersburg—Houston, Texas 77036—223-3003

BEST AVAILABLE COPY

35 pp

I

QUESTION RESTATED

Whether the court of appeals erred in its interlocutory decision remanding for an evidentiary hearing respondents' post-judgment motion to enforce a consent decree entered to implement a class action settlement without requiring the trial court to impanel a jury.

TABLE OF CONTENTS

	Page
QUESTION RESTATED	1
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	9
1. This Court's Decisions Make It Clear That a Federal Court Has Power to Construe and Enforce Its Own Orders and Judgments Without Resorting to a Jury Trial	11
2. Green Bay, By Making a Limited Jury Demand, Has Not Preserved This Issue for Appeal	22
3. The Procedures Approved by the District Court and the Fifth Circuit Afford Green Bay Procedural Due Process	25
CONCLUSION	27
CERTIFICATE OF SERVICE	29

LIST OF AUTHORITIES

CASES

	Page
All States Investors, Inc. v. Bakers Bond Co., 343 F.2d 618 (6th Cir. 1965)	21
Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959)	19, 20
Beecher v. Able, 575 F.2d 1010 (2d Cir. 1978)	13
Board of Trustees v. Charley Toppino & Sons, 514 F.2d 700 (5th Cir. 1975)	26
Brinks, Inc. v. United States, 717 F.2d 700 (2d Cir. 1983)	3
Canister Co. v. Leahy, 182 F.2d 510 (3rd Cir. 1950), *cert. denied*, 342 U.S. 893 (1951)	12
Cia Anon Venezolana de Navegacion v. Harris, 374 F.2d 33 (5th Cir. 1967)	21, 23
Cummins Diesel Michigan, Inc. v. Falcon, 305 F.2d 721 (7th Cir. 1962)	21
Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962)	19
Eilenbecker v. District Court, 134 U.S. 31 (1890)	17, 19
Henry v. Merrill Farms, 94 F.R.D. 730 (N.D. Cal. 1982)	13
In re Corrugated Containter Antitrust Litigation, 80 F.R.D. 244 (S.D. Tex.), *mandamus denied*, No. 78-3684 (5th Cir. 1978)	3

CASES — Page

In re Corrugated Container Antitrust Litigation, 1981-1 Trade Cas. (CCH) ¶ 63,163 at 77,790 (S.D. Tex. 1981) 7
In re Corrugated Container Antitrust Litigation, 1980-1 Trade Cas. (CCH) ¶ 63,163 (S.D. Tex. 1979), *aff'd in part and remanded for add'l findings*, 643 F.2d 195 (5th Cir. 1981), *on remand*, 1981-1 Trade Cas. (CCH) ¶ 64,114 (S.D. Tex. 1981), *aff'd after remand*, 659 F.2d 1322 (5th Cir. 1981), *cert. denied*, 456 U.S. 998 (1982) 2, 14
In re Corrugated Container Antitrust Litigation, 556 F. Supp. 1117 (S.D. Tex. 1982) 2
In re Corrugated Container Antitrust Litigation 752 F.2d 137 (5th Cir. Feb. 4, 1985) 5, 8, 9, 13, 17, 23, 26
In re Debs, 158 U.S. 564 (1895) 17, 18, 19
Interdynamics, Inc. v. Firma Wolf, 653 F.2d 93 (3rd Cir. 1981) 16
Interstate Commerce Commission v. Brimson, 154 U.S. 447 (1894) 18
Jones v. Cleland, 515 F. Supp. 212 (N.D. Ala. 1981) 16
Kelly v. Greer, 365 F.2d 669 (3d Cir. 1966) 21
Kern v. Huidekoper, 103 U.S. 494 (1880) 15
Knox Co. v. Aspinwall, 65 U.S. (24 How.) 376 (1861) .. 21, 22
Millner v. Norfolk & Western Railway, 643 F.2d 1005 (4th Cir. 1981) 20, 21, 24
Missionary Baptist Foundation v. Huffman, 712 F.2d 206 (5th Cir. 1983) 26
Mississippi Barge Line Co. v. United States, 273 F. Supp. 1 (E.D. Mo. 1967), *aff'd sub nom. Osbourne v. Mississippi Valley Barge Line Co.*, 389 U.S. 579 15
Satterwhite v. City of Greenville, 578 F.2d 987 (5th Cir. 1978) (en banc), *vacated on other grounds*, 445 U.S. 940 (1980) 25
Shillitani v. United States, 384 U.S. 364 (1966) 19
Terry v. Adams, 345 U.S. 461 (1953) 15
United States v. City of Detroit, 476 F. Supp. 512 (1979) 16
United States v. Louisiana, 339 U.S. 699 (1950) 12
United States v. Swift & Co., 286 U.S. 106 (1932) 16
United States v. Wallace, 218 F. Supp. 290 (N.D. Ala. 1963) 15
United States v. Washington, 459 F. Supp. 1020 (D.C. Wash. 1978), *aff'd*, 645 F.2d 749 (9th Cir. 1981) 16
Warner v. Rossignol, 513 F.2d 678 (1st Cir. 1975) 12, 21
Winchester Drive-In Theater Inc. v. Warner Brothers Pictures Distributing Corp., 358 F.2d 432 (9th Cir. 1966) .. 20, 21
Wood v. Santa Barbara Chamber of Commerce, Inc., 705 F.2d 1515, *cert. denied*, ____U.S.____, 104 S.Ct. 1446 (1983) 15
Zients v. LaMorte, 459 F.2d 628 (2d Cir. 1972) 13

Page

UNITED STATES STATUTES

18 U.S.C. § 401 16
28 U.S.C. § 1651 15

FEDERAL RULES OF CIVIL PROCEDURE

Rule 12(d) 25
Rule 23(c) 25
Rule 23(e) 6, 13
Rule 38(c) 22
Rule 65 25
Rule 65(a) 25
Rule 69 12
Rule 70 12

FEDERAL RULES OF EVIDENCE

Rule 201(c) 26

RULES OF UNITED STATES SUPREME COURT

Rule 17 ..... 9, 10, 11
Rule 28.1 1

TEXTS

9 C. Wright & A. Miller, Federal Practice and Procedure § 2302, p. 13 (1971) 12
9 C. Wright & A. Miller, Federal Practice and Procedure § 2303, p. 24 (1971) 20
9 C. Wright & A. Miller, Federal Practice and Procedure § 2308, p. 46 (1971) 19
Manual for Complex Litigation § 1.46 (5th Ed. 1982) ... 13

MISCELLANEOUS

Wall Street Journal, October 26, 1976, p. 28 2

NO. 84-1677

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

GREEN BAY PACKAGING, INC.,
Petitioner,

v.

ADAMS EXTRACT COMPANY, et al.,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

Respondent class representative plaintiffs Adams Extract Company, et al., respectfully request this Court to deny the Petition for a Writ of Certiorari for the reasons set forth below.[1]

1. This Brief in Opposition is respectfully submitted in behalf of Adams Extract Company and Rollins Container, Inc., two of the plaintiffs designated by the district court below to represent the certified class. In compliance with Rule 28.1 of this Court, respondents note that the plaintiff certified class consists of an estimated 200,000 persons in the United States who purchased corrugated containers or corrugated sheets from the defendants (or their subsidiaries or affiliates) during the period from January 1, 1960, through January 25, 1978.

STATEMENT OF THE CASE

In late 1975, a federal grand jury was convened to investigate possible criminal antitrust violations involving the corrugated container industry.[2] Following the service of grand jury subpoenas on numerous companies, the Government's investigation became, at least by October 1976, a matter of public knowledge. *See, e.g., Wall Street Journal,* October 26, 1976, p. 28. In March of 1977, the first of many private antitrust actions were filed against thirty-seven corrugated container manufacturers.

On January 25, 1978, the grand jury returned indictments against fourteen corporate and twenty-six individual defendants. The indictments charged that beginning sometime prior to 1960, and continuing to the date of the indictments, a conspiracy had operated to fix the prices of corrugated containers and sheets sold in the area of the United States east of the Rocky Mountains.

On March 20, 1978, plaintiffs, including the respondents herein, filed a single unified complaint on behalf of all purchasers of corrugated containers and sheets. In their answers to the unified complaint, each of the defendants, indicted and unindicted alike, denied any wrongdoing or liability to the plaintiff class. On the same day the unified complaint was filed, plaintiffs moved for class

---

2. The history of this multidistrict class action litigation ("M.D.L. 310") and the companion criminal cases is chronicled in several reported decisions. *See, e.g., In re Corrugated Container Antitrust Litigation,* 1980-1 Trade Cas. (CCH) ¶ 63,163 (S.D. Tex. 1979), *aff'd in part and remanded for add'l findings,* 643 F.2d 195, 202-06 (5th Cir. 1981), *on remand,* 1981-1 Trade Cas. (CCH) ¶ 64,114 (S.D. Tex. 1981), *aff'd after remand,* 659 F.2d 1322 (5th Cir. 1981), *cert. denied,* 456 U.S. 998, 1012 (1982); *In re Corrugated Container Antitrust Litigation,* 556 F. Supp. 1117, 1141-57 (S.D. Tex. 1982).

certification. Shortly thereafter, massive document discovery was conducted by the plaintiffs in M.D.L. 310.[3]

In July and August of 1978, the Government identified in its Bill of Particulars forty-eight corporate and hundreds of individual co-conspirators. Among the unindicted co-conspirators named by the Government were petitioner Green Bay Packaging Inc. ("Green Bay") and eleven of its employees.[4]

During the summer of 1978, prior to determination of plaintiffs' pending class certification motion, plaintiffs settled with two defendants, St. Regis and International Paper. On September 6, 1978, after the first two settlements had been reached, the district court entered an order certifying a single plaintiff class in the consolidated litigation. *In re Corrugated Container Antitrust Litigation*, 80 F.R.D. 244 (S.D. Tex.), *mandamus denied*, No. 78-3684 (5th Cir. 1978). Following class certification, but prior to the Fifth Circuit's denial of mandamus, plaintiffs negotiated nine more settlements aggregating approximately $68 million.

Between January 5, 1979, after the Fifth Circuit denied defendants' petition for a writ of mandamus, and Janu-

---

3. On April 14, 1978, the district court lifted its prior order staying all discovery proceedings and ordered the defendants to make available to the plaintiffs within 30 days all of the 1.5 to 2 million documents they had previously produced to the grand jury. Further document and written interrogatory discovery was conducted by plaintiffs during the latter part of 1978 and early 1979, and depositions on the merits commenced in the Spring of 1979.

4. In addition to other evidence implicating Green Bay in the alleged price-fixing conspiracy, it may be noted that three Green Bay employees indicated they would take the fifth amendment in M.D.L. 310. *See, e.g., Brinks, Inc. v. United States*, 717 F.2d 700 (2d Cir. 1983) (employee's assertion of fifth amendment gives rise to reasonable inference that employer is guilty in a civil case).

ary 22, 1979, the beginning of the trial of the companion criminal cases, plaintiffs negotiated eleven additional settlements aggregating approximately $219 million. This group, known as the "post-January 5 settlements", included the Green Bay settlement.[5]

The Green Bay settlement obligated Green Bay to pay $5,557,000 to settle all of the claims against it. These claims represented a potential joint and several liability on the part of Green Bay to the class totalling several hundred million dollars. To meet its settlement obligations Green Bay deposited in escrow a promissory note in the principal amount of $5,557,000, plus interest to be paid according to an agreed variable rate. Green Bay's settlement also contained among other provisions a "most favored nations" clause that read, in part:

> Plaintiffs agree that, *unless present circumstances materially change* so that plaintiffs reasonably conclude that the prospect or amount of ultimate recovery from any similarly situated defendant is substantially lessened or reduced, they will not enter into a settlement of the class actions in M.D.L. 310 with any such similarly situated defendant that is more favorable to such defendant . . . without offering similar terms to [Green Bay]; *provided,* however, that . . . , if [Green Bay] accepts said offer, it agrees to pay such additional amount as necessary to make the aggregate amount paid by [Green Bay] proportionately equal to the aggregate amount paid by such other defendant.

---

5. Although the Green Bay settlement was dated March 14, 1979, it was in fact negotiated and agreed to prior to the start of the criminal trial. By the time the criminal trial began, thirty of the forty criminal defendants had pleaded *nolo contendere.*

See In re Corrugated Container Antitrust Litigation, 752 F.2d 137, 139, n.3 (5th Cir. Feb. 4, 1985) (emphasis added).[6]

Circumstances materially changed shortly after the settlement was signed. On April 27, 1979, following only three hours of deliberation, the jury in the companion criminal cases acquitted all ten defendants that went to trial. In the aftermath of the acquittals in the criminal cases, plaintiffs were able to negotiate settlements with eight additional defendants totalling approximately $21 million, an amount proportionately less than many of the prior settlements.[7]

---

6. Virtually all of the other contemporaneous settlements contained a "most favored nations" clause in identical language. Green Bay and the class plaintiffs signed a letter agreement elucidating the clause. The letter agreement stated, in part:

> As you [Green Bay] fully understand, the foregoing representations are designed to assure you that under present circumstances we [the class plaintiffs] will not enter into a settlement agreement with any other unindicted defendant on more favorable terms than those agreed to with Green Bay. You, however, fully understand that we must retain the freedom to enter into settlement agreements on non-comparable terms with defendants under different circumstances presented as the events of this litigation unfold. *For example, as the Court issues rulings in this case and the criminal case, as evidence unfolds in either case,* or as the law governing liability or class action changes, *it might become obvious that we have a weaker or stronger case than we now think against Green Bay* and the other defendants.
>
> If circumstances change in such a way to adversely affect the present position of the plaintiffs, then we are free to settle on more favorable terms with another defendant without offering Green Bay similar terms. . . .

Green Bay App. at F-5 to -6 (emphasis added).

7. After another year of extensive discovery and trial preparation, and at the conclusion of a four-month trial, the jury returned a special verdict against Mead Corporation, the sole remaining defendant. The jury expressly found that Mead had conspired to fix prices in the corrugated container industry with nineteen of the settling defendants and that the prices of corrugated containers and

The pre- and post-January 5 settlements drew objections from several quarters. A few class members complained the settlements were not large enough; a handful complained the settlements with the container purchasers were too large; the single nonsettling defendant, Mead Corporation, complained that the settlements extinguished its claimed right of contribution against the settling defendants; and the settling defendants argued that final approval of the settlements should await adjudication by this Court of Mead's alleged right to contribution.

In an evidentiary hearing held pursuant to Federal Rule 23(e), the district court considered extensive evidence and argument concerning the reasonableness of the settlements, including the Green Bay settlement. In granting final approval to these settlements, the district court stated that it gave "considerable weight" to the fact of the acquittals.

> In deciding whether to approve settlements on behalf of a class, the judge must determine whether they are fair, reasonable, and adequate. The *Manual for Complex Litigation* suggests that the single most important factor to be considered is the strength of the plaintiffs' case in relation to the amount offered in settlement. *Manual* at 56. *In this respect, the court must give considerable weight to the fact that the trial of those indicted resulted in acquittal for all defendants,* and to the fact that the partial settlements before the court represent a very significant percentage of the total estimated damages to the class.

---

sheets had been artificially inflated by five percent as a result of the defendants' conduct. The jury, however, found for Mead on the issue of fraudulent concealment. *Id.* Thereafter, and prior to entry of a final judgment on the verdict, plaintiffs settled with Mead for $45 million. Green Bay, having previously settled with plaintiffs, was not a participant at the trial and was found by the jury not to have participated in the conspiracy with Mead.

In re Corrugated Container Antitrust Litigation, 1981-1 Trade Cas. (CCH) ¶ 63,163 at 77,790 (S.D. Tex. 1981) (emphasis added).

Green Bay joined a number of other defendants in submitting briefs to the Fifth Circuit defending the district court's judgment approving the settlements. Green Bay and the other settling defendants stated:

> The district court expressly held that the settlements "were negotiated before the evidence was presented and the defendants acquitted in the trial of those indicted; it would be a long, hard and expensive task to achieve equal concessions should the court disapprove these settlements and send the parties back to their negotiations." Pretrial Order No. 31, Memorandum Opinion and Order, p. 13 (Docket No. 1262). *Settling defendants join in this view, and submit to this Court that the settlement value of this case has greatly diminished since the criminal acquittals.***
>
> ** Significantly, settlements concluded since the acquittals have been for amounts (proportionately per market share of defendant) significantly lower than the average of the settlements on appeal in the instant case.

(Defendants' Fifth Circuit Brief at 25 and n.** (emphasis added).

Nevertheless, following the district court's approval of its settlement and the entry of a consent decree thereon, Green Bay refused to make further payments pursuant to its promissory note. Instead, Green Bay contended class plaintiffs had violated the "most favored nations" clause by agreeing to more favorable terms with the defendants who settled after the acquittals.[8] Upon Green

8. Green Bay is the only settling defendant that has persisted in making any claim that the "most favored nations" clause was violated or refused to perform any of its settlement obligations for

Bay's breach of its obligations under the consent decree, plaintiffs sought an order in M.D.L. 310 directing Green Bay to comply with the court-approved settlement and consent decree. The district court granted plaintiffs' motion, and Green Bay appealed.

The principal issue on appeal was whether the district court retained jurisdiction over Green Bay in M.D.L. 310 for purposes of enforcing the settlement. The Fifth Circuit noted that the district court's final judgment approving the settlement, while dismissing Green Bay with prejudice, retained jurisdiction of the settlement fund "for the purpose of effectuating the settlement." 752 F.2d at 140. The Fifth Circuit held that the district court's "consent decree incorporated the terms of [the] settlement agreement" and construed the district court's final judgment and decree entered pursuant to the Green Bay settlement "to be, in effect, one ordering Green Bay to make the payments called for by the note." *Id.* at 141. Thus, the Fifth Circuit concluded:

> While we do not reach the question of whether every order terminating litigation on the basis of a court-approved settlement necessarily implies that *the court has ordered the carrying out of all post-dismissal actions called for by the settlement agreement,* or has retained jurisdiction for that purpose, *here the district court's action had that effect.*

Id. at 142 (emphasis added).

Green Bay does not here seek review of that holding.

---

any reason. Green Bay had made all of its required installment payments until late 1980, when plaintiffs, out of an abundance of caution, initiated a declaratory relief action seeking a ruling as to whether any of the subsequent settlements violated the clause. Plaintiffs brought that declaratory relief action prior to any violation of the consent decree by Green Bay.

The second issue on appeal was whether plaintiffs had violated the "most favored nations" clause by negotiating post-acquittal settlements on terms more favorable to other defendants than Green Bay received before the acquittals. Holding that this question could not be resolved summarily, the Fifth Circuit remanded the matter with instructions to the district court to conduct an evidentiary hearing on this issue. *Id.* at 142-43.

Third, the court of appeals affirmed the district court's declining to rescue himself. *Id.* at 145. Green Bay does not here seek review respecting either the second or third holdings of the Fifth Circuit.

In its appellants' brief before the Fifth Circuit, Green Bay devoted four sentences to arguing that it was entitled to a jury trial. Green Bay's Opening Brief at 43. The Fifth Circuit rejected that argument, holding that a post-judgment motion brought to enforce a consent decree is to be resolved by the court. 752 F.2d at 144.

It is this holding that Green Bay now requests this Court to review.

REASONS FOR DENYING THE WRIT

The Petition fails to state any reason for granting certiorari. Rule 17 of this Court provides:

> A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefore. The following, while neither controlling or fully measuring the court's discretion, indicate the character of reasons which will be considered:
> . . .

> (a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision. . . .
>
> (c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

Green Bay has shown no conflict among the circuits, no conflict with the decisions of this Court, no important question of federal law that this Court has not previously decided, and certainly no unusual departure from the normal course of judicial proceedings.

To the contrary, Green Bay has presented a question falling well within the guidelines set by prior decisions of this Court and as to which there is no conflict among the circuits. Moreover, the precise question—whether post-judgment enforcement of a court-ordered class action settlement decree requires the court to resort to a jury for findings of fact—arises so infrequently that it cannot be said the Fifth Circuit has "decided an important question of federal law."

A long line of this Court's decisions—as well as logic and principles of sound judicial administration—establish that a federal court has, as a necessary and inherent adjunct of the judicial power, the ability to enforce its

own orders and decrees without having to resort to a jury for determining fact issues. Green Bay has overlooked the fact that the instant case involves not merely the interpretation of a settlement agreement resolving litigation before the court, but the enforcement of a court-approved consent decree that incorporated the executory provisions of the settlement agreement. In resolving disputes concerning the construction and enforcement of a court-approved consent decree, the parties are not entitled to a jury trial.

Furthermore, petitioner failed to properly demand a jury and therefore would not under any circumstances be entitled to one. And in any event, the issue presented here could arise only in a narrow range of cases. Only rarely, if ever, do disputes arise concerning the supposed need for a jury trial in post-judgment proceedings pertaining to the enforcement of class action consent decrees. Indeed, petitioner has not presented a single other case dealing with this issue, much less the decision of another circuit court disagreeing with the Fifth Circuit's holding in this case. Moreover, the Fifth Circuit's decision is interlocutory, since the matter has been remanded for an evidentiary hearing on the merits. The instant case simply does not meet the standards of Supreme Court Rule 17.

1. This Court's Decisions Make It Clear That a Federal Court Has Power to Construe and Enforce Its Own Orders and Judgments Without Resorting to a Jury Trial

Green Bay has attempted to portray this action as a routine breach of contract case for money damages, thereby entitling it to a jury trial. Green Bay's portrayal, however, totally misconceives the nature of the proceed-

ing below.[9] By attempting to divorce the issue from its procedural context, petitioner has fatally flawed it analysis.

> [I]ssues are not inherently legal or equitable. They are like chameleons which take their color from the surrounding circumstances.

9 C. Wright & A. Miller, Federal Practice and Procedure § 2302, at p. 13 (1971).

Contrary to petitioner's mischaracterization of the issue, plaintiffs here do not merely seek to enforce a contract. Indeed, plaintiffs do not merely seek to enforce a court-approved class action settlement agreement. Rather, plaintiffs have sought an order necessary to effectuate and enforce a court's final judgment and decree that, in effect, incorporated the executory terms of a class action settlement.[10]

---

9. Even if the crucial point that the court below was held to be enforcing its own decree is ignored Green Bay's portrayal also overlooks the fact that the proceedings in the district court are more aptly characterized as seeking specific performance of an obligation to pay a contractually stipulated sum, and not as a simple claim for money damages. In the instant case plaintiffs sought, in effect, specific performance of Green Bay's promise to pay its promissory note, as required by the settlement agreement and consent decree. An action for specific performance or for an injunction is equitable only and not triable to a jury. *United States v. Louisiana,* 339 U.S. 699 (1950); *Canister Co. v. Leahy,* 182 F.2d 510 (3rd Cir. 1950), *cert. denied,* 342 U.S. 893 (1951).

A case cited by Green Bay, *Warner v. Rossignol,* 513 F.2d 678 (1st Cir. 1975), for the proposition that a jury is not required in connection with a motion to enforce a settlement agreement actually held as its primary ruling that the motion sought specific performance and was therefore an equitable proceeding. *Id.* at 683.

10. The proceeding in the court below is closely akin to a proceeding under rules 69 or 70 of the Federal Rules of Civil Procedure to execute a judgment. Surely, in proceedings under rules 69 or 70 there is no right to a jury trial of fact issues.

In the order appealed from, the district court did not simply rule on a contract dispute, but instead "ordered Green Bay to comply with [its] consent decree." *In re Corrugated Container Antitrust Litigation,* 752 F.2d 137, 140 (5th Cir. Feb. 4, 1985). This conclusion flows from an analysis of the settlement agreement, the final judgment entered pursuant to the settlement agreement, and the totality of circumstances surrounding both.

The parties submitted the settlement to the court for approval as they were required to do by rule 23(e) of the Federal Rules of Civil Procedure. Under the rule and the express terms of the settlement agreement, the settlement with Green Bay could not be effectuated without the court's approval. Green Bay App. at D-3, D-6 and D-7. In approving a class action settlement, the court acts in a fiduciary capacity as the ultimate guardian of the interests of absent class members. *Beecher v. Able,* 575 F.2d 1010, 1016 (2d Cir. 1978); *Zients v. LaMorte,* 459 F.2d 628, 630 (2d Cir. 1972); *Henry v. Merrill Farms,* 94 F.R.D. 730, 733 (N.D. Cal. 1982). *See generally,* Manual for Complex Litigation § 1.46 (5th Ed. 1982). As the Second Circuit noted in *Beecher v. Able, supra,* a district court has "broad supervisory powers" in the administration of class action cases. 575 F.2d at 1016.

The court preliminarily approved the settlement and directed plaintiffs to notify class members of the proposed settlement and their right to have objections heard.

After an exhaustive review of the evidence, and after considering extensive briefing and argument both in favor of and in opposition to the settlement agreement, the district court gave final approval to the settlements.

When the Fifth Circuit remanded for a further round of briefing and fact-finding, *see In re Corrugated Container Antitrust Litigation,* 643 F.2d 195 (5th Cir. 1981), the district court rendered more than ninety pages of additional findings of fact and conclusions of law. The Fifth Circuit then affirmed all of the settlements, including Green Bay's, as "fair, reasonable and adequate," and this Court denied certiorari. *In re Corrugated Container Antitrust Litigation,* 659 F.2d 1322 (5th Cir. 1981), *cert. denied,* 456 U.S. 998, 1012 (1982).

The Green Bay settlement thus was scrutinized by and received the well-considered approval of the district court and was not disturbed on appeal.

In its settlement agreement, Green Bay expressly promised that it would undertake any steps required by order of the district court necessary to effectuate the settlement. Paragraph 2 of the Green Bay settlement agreement reads as follows:

> 2. *The undersigned agree to undertake* their best efforts, including all steps and efforts contemplated by this Agreement, and *any* other *steps and efforts which may become necessary by order of the Court* or otherwise, *to effectuate this Agreement and the settlement set forth herein.* (Emphasis added).

Green Bay App. at D-3. Furthermore, paragraph 5 of the district court's final judgment provides:

> Without affecting the finality of this judgment in any way, *this Court hereby retains continuing jurisdiction over* the Plaintiff Container Purchaser Subclass and *the Settling Defendant with respect to discovery disputes,* as provided in said settlement with Settling Defendant, *and this Court hereby retains continuing*

> *jurisdiction over the Settlement Fund described in said settlement, for the purpose of effectuating the settlement* and for the purpose of directing the disposition of the settlement Fund in accordance with the terms of the settlement, ...

752 F.2d at 140. (Emphasis in quotation).

When Green Bay refused to pay its promissory note in accordance with its obligations under the court's consent decree, plaintiffs brought a motion to compel Green Bay to comply with that decree. It has never been questioned that a federal court has broad discretion to fashion a remedy to protect and effectuate its own orders and judgments. *See, e.g., Kern v. Huidekoper,* 103 U.S. 494, 514 (1880) (federal court has the power to issue an "auxiliary" injunction in order to effectuate its prior judgment rendered in an action at law); *Terry v. Adams,* 345 U.S. 461, 470 (1953) (court retains the power to enter orders and decrees as are necessary and proper in order to effectuate its judgment); *Mississippi Barge Line Co. v. United States,* 273 F. Supp. 1, 6 (E.D. Mo. 1967), *aff'd sub nom. Osbourne v. Mississippi Valley Barge Line Co.,* 389 U.S. 579 (federal courts have "the inherent and statutory (28 U.S.C. § 1651) power and authority to enter such orders as may be necessary to enforce and effectuate their lawful orders and judgments"); *Wood v. Santa Barbara Chamber of Commerce, Inc.,* 705 F.2d 1515, 1524, *cert. denied,* ____U.S.____, 104 S.Ct. 1446 (1983) (federal court "retains jurisdiction to enforce the judgment it enters," even where the court has long since entered its final judgment); *United States v. Wallace,* 218 F. Supp. 290, 292 (N.D. Ala. 1963) (federal courts have "inherent power to enter such orders as may be necessary to effectuate their lawful decrees and to pre-

vent interference with, and obstruction to, their implementation"); *United States v. City of Detroit*, 476 F. Supp. 512, 520 (1979) (federal court has a "broad range of equitable powers available . . . to enforce and effectuate its orders and judgments"); *United States v. Washington*, 459 F. Supp. 1020, 1115 (D.C. Wash. 1978), *aff'd*, 645 F.2d 749 (9th Cir. 1981) (federal court "has broad discretion to fashion remedies which will protect and effectuate its earlier rulings, the more so when the public interest and the rights of a large group of people are involved").

It is also settled that a motion to enforce a judgment is "the proper method to seek [the] assistance of a federal district court in interpreting its judgment." *Jones v. Cleland*, 515 F. Supp. 212, 213 n.1 (N.D. Ala. 1981). A consent decree is not a mere contract, and this is no mere contract dispute. As this Court declared in *United States v. Swift & Co.*, 286 U.S. 106, 115 (1932): "We reject the argument . . . that a decree entered upon consent is to be treated as a contract and not as a judicial act." *Accord, Interdynamics, Inc. v. Firma Wolf*, 653 F.2d 93, 96 (3rd Cir. 1981). The cases also make it plain "that a party violating a consent decree may be subject to the powers by which a court protects its judgments, including, most notably, the power of contempt under 18 U.S.C. § 401 (1976)." *Id.* at 97.

With this background, the Fifth Circuit in the instant appeal easily determined that plaintiff's motion was not a lawsuit for breach of contract.

> [T]his agreement was more than a bargain struck between two parties; this contract had been approved by the court, had become a part of the consent decree and had merged in that decree.

752 F.2d at 142. Rather, the Fifth Circuit properly considered the instant proceedings to be "a motion to enforce the court's judgment." *Id.* at 144. As the court of appeals noted at the outset of its opinion, in this proceeding "plaintiffs seek to collect from one of the defendants the amount fixed by the Court in a consent decree that incorporates the terms of a settlement agreement between the plaintiffs and that defendant." *Id.* at 139.

Because the proceedings here constitute a motion to have the court enforce its own judgment, it has long been established that no right to a jury trial exists.

> It has always been one of the attributes—*one of the powers necessarily incident to a court of justice—that it should have this power* of vindicating its dignity, of *enforcing its orders,* of protecting itself from insult, *without the necessity of calling upon a jury* to assist it in the exercise of this power. . . . [*C*]*ourts of justice are universally acknowledged to be vested, by their very creation, with power to impose* silence, respect, and decorum in their presence, and *submission to their lawful mandates;* . . .

Eilenbecker v. District Court, 134 U.S. 31, 36 (1890) (emphasis added).

> *A court without the power effectually* to protect itself against the assaults of the lawless, or to *enforce its orders, judgments, or decrees* against the recusant parties before it, *would be a disgrace* to the legislation, and a stigma upon the age which invented it.

In re Debs, 158 U.S. 564, 595 (1895) (emphasis added). This Court has repeatedly recognized, then, the need for a court to have the ability to enforce its own orders, and to do so without resort to another fact-finding body like a jury.

> [T]his is no technical rule. In order that a court may compel obedience to its orders, it must have the right to inquire whether there has been any disobedience thereof. To submit the question of disobedience to another tribunal, be it a *jury* or another court, would operate to deprive the proceeding of half its efficency.

In re Debs, 158 U.S. 564, 595 (1895) (emphasis added).

In *Interstate Commerce Commission v. Brimson*, 154 U.S. 447 (1894), the circuit court had voided section 12 of the Interstate Commerce Act as an unconstitutional extension of judicial power. Section 12 granted the ICC the power to subpoena witnesses and documents. The section further empowered the circuit courts to issue orders requiring compliance with ICC subpoenas.

On appeal to the Supreme Court, defendants argued that the procedure of section 12 denied defendants the right to a jury trial. The Supreme Court, in upholding the statute, rejected defendants' argument. The Court reasoned that a circuit court order requiring compliance with an ICC subpoena constituted "a determination of questions upon which a court of the United States is capable of acting, *and which may be enforced by judicial process.*" 154 U.S. at 489 (emphasis added).

> If there is any reason why [defendants] should not be required to answer the questions put to them, or to produce the books, papers, etc., demanded of them, their rights can be recognized and enforced by the court below. . . .

Id.

The rule that courts may summarily enforce their own orders arises most frequently in the context of contempt proceedings. "As a general proposition,[11] there is no right to trial by jury in a contempt proceeding to punish the violation of an injunction." 9 C. Wright & A. Miller, Federal Practice and Procedure § 2308, at p. 46 (1971); *see Eilenbecker v. District Court*, 134 U.S. 31 (1890). A court enforcing its own orders by contempt proceedings is not executing the criminal laws, but only securing to the parties the rights the court adjudged them entitled to. *In re Debs*, 158 U.S. 564, 595 (1895). Similarly, a court enforcing its own settlement decree, such as the one present here, is not resolving a contract dispute, but securing to the litigants the rights the court adjudged them entitled to receive.

Although the no-jury rule arises most frequently in contempt proceedings, the language and rationale of the cases are by no means so limited. Indeed, the reasoning of the contempt cases applies with equal logic to the instant proceedings in which class plaintiffs have sought simply to compel compliance with the district court's final judgment: the dignity and efficiency of the court system depends on a court's ability to enforce compliance with its own orders without resort to another tribunal like a jury.

The cases cited by Green Bay simply do not support its position. Green Bay's emphasis on *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962), and *Beacon Theatres*,

---

11. The courts unquestionably have power summarily to enforce compliance with their orders through *civil* contempt proceedings. *Shillitani v. United States*, 384 U.S. 364, 370 (1966). The conditional nature of the sanctions—which ends upon the party's compliance—justifies holding contempt proceedings without a jury. *Id.* at 370-71.

Inc. v. Westover, 359 U.S. 500 (1959), is misplaced, because neither case was concerned with any question regarding the right to jury trial in connection with a proceeding by a court to enforce its own order.

Similarly, for several reasons Green Bay has incorrectly relied on *Millner v. Norfolk & Western Railway,* 643 F.2d 1005 (4th Cir. 1981), and *Winchester Drive-In Theater, Inc. v. Warner Brothers Pictures Distributing Corp.,* 358 F.2d 432 (9th Cir. 1966). In the first place, neither case dealt with the question of whether there was a right to jury trial in a post-judgment proceeding to enforce a consent decree.[12]

Second, Green Bay itself recognizes the overwhelming authority holding that a court may summarily enforce a settlement compromising a case before the court.

---

12. The procedural context of *Millner* is a world apart from the present case. *Millner* was an FELA damages action for personal injuries. The defendant employer initially answered denying liability on the merits, and later filed an amended answer raising an affirmative defense that the plaintiff has entered into a settlement agreement thereby releasing his claims against the defendant. *Id.* 643 F.2d at 1006-07. In holding that plaintiff was entitled to a jury trial on this issue, the court merely determined that plaintiff had preserved his right to trial by jury of an affirmative defense raised prior to the trial of his case-in-chief. In the instant proceeding, by contrast, the underlying claims of the plaintiffs were extinguished by the consent decree, and plaintiffs now seek an order enforcing that decree. The other cases cited by petitioner are similarly inapposite. None of the federal cases relied upon by petitioner are concerned with the right to jury trial in connection with post-judgment proceedings brought to enforce a consent decree.

Citations to state cases concerning the right to jury trial are beside the point. As stated in a leading treatise: "It is now clear that federal law determines whether there is a right to jury trial in a case in federal court and that state law is wholly irrelevant." 9 C. Wright & A. Miller, Federal Practice and Procedure § 2303, at p. 24 (1971). The state cases cited are, in any event, distinguishable for the same reasons applicable to the federal cases cited by petitioner.

> Federal courts have held under a great variety of circumstances that a settlement agreement once entered into cannot be repudiated by either party and will be summarily enforced.

Cia Anon Venezolana de Navegacion v. Harris, 374 F.2d 33, 35 (5th Cir. 1967); *accord, Warner v. Rossignol,* 513 F.2d 678, 683-84 (1st Cir. 1975); *Kelly v. Greer,* 365 F.2d 669, 671 (3d Cir. 1966); *All States Investors, Inc. v. Bakers Bond Co.,* 343 F.2d 618, 624 (6th Cir. 1965); *Cummins Diesel Michigan, Inc. v. Falcon,* 305 F.2d 721, 723 (7th Cir. 1962).

Third, neither *Millner* nor *Winchester* disputed the proposition just cited. In fact, *Millner* itself cited *Cia Anon Venezolana* with approval. 643 F.2d at 1009.

Finally, and most important, neither *Millner* nor *Winchester* raised the issue of the court's power to enforce its own orders without resort to a jury. As indicated above, a long line of cases has recognized the need for the federal courts to have the power to determine themselves all issues concerning obedience to their orders.

At only one point in its petition, Pet. at 16-17, does Green Bay appear to recognize that plaintiffs here have moved to enforce the district court's judgment and decree. In response, Green Bay makes a single argument: "Cases begun at law remain at law; those begun in equity remain in equity," citing *Knox Co. v. Aspinwall,* 65 U.S. (24 How.) 376 (1861). *Knox,* however, provides no support for Green Bay's argument and, indeed, supports class plaintiffs' position here.

Knox, decided before the merger of law and equity, stood for the straightforward proposition that a court at

law would not be justified in turning parties over to another tribunal, even though the court at law had entered judgment and another tribunal could supply an adequate remedy. Rather, the Supreme Court held that a court has power "to compel satisfaction of its own judgments," *id.* at 385, whether by issuance of a writ of mandamus—as the court at law had done in *Knox*—or otherwise. Thus, *Knox* supports class plaintiffs position that a court has power to enter all writs and orders necessary to satisfy its own judgments.

In short, none of the cases or authorities support the proposition that a federal court must impanel a jury to decide fact questions in a civil proceeding brought to enforce its prior judgments, decrees or orders. Thus, the jury trial question in the case is neither disputed, nor novel, and presents no issue warranting this Court's review. Moreover, for the reasons stated below, the question is not presented in an appropriately clear context for review in any event.

2. Green Bay, By Making a Limited Jury Demand, Has Not Preserved This Issue for Appeal

Rule 38(c) of the Federal Rules of Civil Procedure provides: "In his [jury] demand a party may specify the issues which he wishes so tried." A party who makes such a limited jury demand is not entitled to a jury trial on issues not specified. Green Bay, by making a limited jury demand, has failed to preserve any claim to a jury trial on issues not specified, including any purported right in post-judgment proceedings.

It is undisputed that Green Bay failed to make a specific jury demand with respect to these settlement

enforcement proceedings in M.D.L. 310.[13] Green Bay, however, argues that its initial jury demand in its answer to plaintiffs' unified complaint preserved the issue. Green Bay is simply wrong.

Green Bay's answer to the unified complaint stated, "Defendant demands a jury trial on all issues that are triable by jury *as to each complaint answered herein.*" Green Bay App. at G-3 (emphasis added). The issues in the unified complaint, however, were never tried; instead, Green Bay and the class plaintiffs chose to compromise those issues. *See In re Corrugated Container Antitrust Litigation,* 752 F.2d 137, 144 (5th Cir. Feb. 4, 1985). "The factual issues presented by the pleadings became irrelevant upon effectuation of the settlement." *Cia Anon Venezolana de Navegacion v. Harris,* 374 F.2d 33, 35 (5th Cir. 1967).

Green Bay's limiting its jury demand was not the result of inadvertence or chance. Rather, Green Bay calculatedly limited its jury demand to serve its own purposes. At the time of Green Bay's answer, plaintiffs had previously filed some fifty-five separate complaints. Green Bay argued it had not properly been made a party in some of those fifty-five cases.

---

13. Of course, Green Bay's jury demand in the separate declaratory judgment action filed before Green Bay violated the consent decree could not preserve the issue in M.D.L. 310. Plaintiffs also do not concede Green Bay is entitled to a jury trial in the declaratory relief action. *See* p. 12 n.9 *supra.* In any event, plaintiffs note that the declaratory relief action is hardly an adequate alternative to the instant proceedings, given Green Bay's claim that the district court lacks jurisdiction to decide that action, Green Bay App. at H-1.

Furthermore, Green Bay's "objection" in the show cause proceeding could in no way be construed as a jury demand; and, in any event, the show cause order was discharged.

When plaintiffs filed the unified complaint, which included and superseded all fifty-five actions, Green Bay took the position that the filing of a consolidated complaint could not make Green Bay a proper defendant as to plaintiffs that, according to Green Bay, had failed to make Green Bay a proper party in the superseded individual actions. It was in order to preserve this position that Green Bay phrased its answer the way it did: "Green Bay . . . , hereby answers the Unified and Consolidated Complaint . . . , and makes its affirmative defenses and objections thereto separately for each and every complaint in each and every civil action identified in Exhibit A attached hereto in which defendant has been properly made a party, ..." Green Bay App. at G-1 to -2.

It was also in order to preserve this position that Green Bay limited its jury demand to "all issues that are triable by jury as to *each complaint answered herein.*" Green Bay App. at G-3 (emphasis added). Having intentionally and calculatedly limited its jury demand, Green Bay cannot successfully argue that its jury demand extends to all issues, including post-judgment issues not encompassed by those complaints.

Millner, upon which Green Bay relies, is inapposite. In *Millner* the plaintiff's original jury demand made "no specification of the issues to which his demand ran." 643 F.2d 1010. Here, by contrast, Green Bay requested a jury trial only on the issues in the consolidated complaint. Therefore, even if Green Bay were entitled to a jury—which it is not—it failed to make a proper request for one.

3. The Procedures Approved by the District Court and the Fifth Circuit Afford Green Bay Procedural Due Process

Green Bay contends that somehow the plenary hearing ordered by the Fifth Circuit will deprive Green Bay of alleged constitutional rights. Green Bay based this contention on two arguments, both erroneous.

First, Green Bay argues that the plenary hearing is a "hybrid procedure unknown to the federal rules," Pet. at 20. Green Bay's argument, however, ignores the fact that federal courts may hold evidentiary hearings without a jury to determine motions of all kinds, including motions for class certification, *see* Fed. R. Civ. P. 23(c); *Satterwhite v. City of Greenville,* 578 F.2d 987, 998 (5th Cir. 1978) (en banc), *vacated on other grounds,* 445 U.S. 940 (1980), preliminary injunctions, Fed. R. Civ. P. 65(a), permanent injunctions, Fed. R. Civ. P. 65, motions to dismiss for lack of jurisdiction or improper venue, Fed. R. Civ. P. 12(d), and motions to enforce judgment, *see* pp. 11-21 *supra.* The evidentiary hearing, far from being a "hybrid procedure unknown to the federal rules," represents a fact-finding procedure commonly utilized by federal courts to resolve issues arising in any number of contexts. The evidentiary hearing ordered here does not involve a novel procedure and certainly does not have constitutional implications.

Second, Green Bay faults the Fifth Circuit for noting, 752 F.2d at 143, that the district court could take judicial notice of the extensive record compiled in the *Corrugated Container* litigation. Pet. at 21. Contrary to what Green Bay may say, however, the Fifth Circuit simply author-

ized a procedure well recognized in our judicial system. Federal Rule of Evidence 201 expressly permits a court to take judicial notice of established facts. In particular, the court can take judicial notice of facts contained in the record of related cases and proceedings. *Missionary Baptist Foundation v. Huffman,* 712 F.2d 206, 211 (5th Cir. 1983); *Board of Trustees v. Charley Toppino & Sons,* 514 F.2d 700, 704 (5th Cir. 1975).

Green Bay, overlooking these principles and precedents, apparently fears that it will "not know the particular evidential facts of which the [district court will] take notice and on which it [will create] its conclusion." Pet. at 21. Indeed, rule 201 itself does entitle a party to "an opportunity to be heard as to the propriety of taking judicial notice," Fed. R. Evid. 201(c). Green Bay, however, has raised a purely hypothetical straw man based upon a groundless apprehension of what may occur on remand. No reason exists for speculating that the district court will not comply with rule 201(c). To the contrary, there is every reason to believe that the district court will zealously protect the rights of the litigants, including Green Bay's right to be heard on the propriety of taking judicial notice of any facts. As the Fifth Circuit said:

> The district judge has given us no reason to believe that he will not continue to conduct these proceedings fairly. . . . We are confident that the district judge who has heard the case to this stage is capable of according to Green Bay the fair hearing to which it is entitled, ...

In Re Corrugated Container Antitrust Litigation, 752 F.2d 137, 145 (5th Cir. Feb. 4, 1985).

CONCLUSION

The petition for certiorari raises no issue not already decided by this Court. On many occasions, this Court has reaffirmed the power of federal courts to enforce their own orders, judgments, and decrees without resorting to another fact-finding tribunal like a jury. Whatever purported entitlement Green Bay might have to a jury in a contract dispute clearly does not pertain here, where class plaintiffs seek to enforce the district court's judgment. The district court, having ordered Green Bay to carry out all its post-dismissal obligations under the settlement agreement, may enforce its decree after a nonjury evidentiary hearing. No conflict exists in the decisions of this Court or any other courts on this issue.

The procedure contemplated here is precisely the same as authorized by the Federal Rules in many other contexts, including preliminary injunction and class action settlements.

The unanimous decision of the court of appeals in this case is fully in accord with this Court's decisions concerning the right to jury trial and principles of due process. The petition presents no important question of federal law and demonstrates no reason why this Court's review is either necessary or desirable.

Dated this _____ day of May, 1985.

Respectfully submitted,

STEPHEN D. SUSMAN*
TERRELL W. OXFORD
2400 Allied Bank Plaza
Houston, Texas 77002
(713) 651-9366

JACK CORINBLIT*
MARC M. SELTZER
3700 Wilshire Blvd., Suite 820
Los Angeles, California 90010
(213) 380-4200

By: _____
STEPHEN D. SUSMAN

Attorneys for Respondents
Adams Extract Company, et al.

Of Counsel:

SUSMAN, GODFREY & MCGOWAN
2400 Allied Bank Plaza
Houston, Texas 77002
(713) 651-9366

CORINBLIT, SHAPERO & SELTZER
A Partnership of Professional
Corporations
3700 Wilshire Blvd., Suite 820
Los Angeles, California 90010
(213) 380-4200

---

* Counsel of Record

CERTIFICATE OF SERVICE

This is to certify that on the _____ day of May, 1985, three copies of the above and foregoing Brief in Opposition were served on:

Mr. Wayne J. Roper
Mr. William J. French
Gibbs, Roper, Loots & Williams
757 North Broadway
Milwaukee, Wisconsin 53202
Attorneys for Green Bay Packaging, Inc.

Mr. Charles Alan Wright
Of Counsel
Professor of Law
University of Texas School of Law
727 E. 26th Street
Austin, Texas 78705

by placing such copies in properly addressed envelopes, postage prepaid, and depositing them in the United States mail.

STEPHEN D. SUSMAN